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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 1011

THAD BENSON CARTER,

Petitioner,

vs.

GEORGE A. KUBLER,

Respondent.

PETITION AND BRIEF.

FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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Petitioner.

UNITED STATES LAW PRINTING COMPANY, CHICAGO

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OCTOBER TERM, 1944.

NO.

THAD BENSON CARTER,

Petitioner,

vs.

GEORGE A. KUBLER,

Respondent.

PETITION.

For a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

The brief in support of this petition begins at page 11.

All emphasis in this petition and brief is supplied except where it is stated otherwise.

To the Honorable Harlan Fiske Stone, Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

I.

A Summary Statement of the Matter Involved.

The petitioner is a farmer debtor who had two farms and invoked Section 75 of the Bankruptcy Act, 11 U. S. C. 203, to save them. This petition for review concerns his remaining farm of 168 acres which he desires to redeem pursuant to Section 75 (s) (3).

He has already lost one farm of 112 acres through an order of the court below, by the same judge of the District Court, before the Bartels decision of this court in 308 U. S. 180, held that a bankruptcy court may not disclaim a farm or dismiss a farmer debtor proceeding as to any property (R. 3, entry of October 9, 1936). He was unable to maintain an appeal and it was dismissed. (R. 4, entry of April 14, 1937).

An attempt to sell this 168 acre farm was prevented by the directly applicable decision of this Court in *Wright* v. *Union Central,* 311 U. S. 273, which held that a farmer debtor has a right to redeem his farm at its value, prior to a public sale. The change in the district court's order is reflected in the order of March 21, 1941, at R. 7, which found on petition for review that "the decision of the Supreme Court in the case of *Wright* v. *Union Central Life Insurance Company* should be followed."

It was ordered that the conciliation commissioner:

> "have a re-appraisement of the farm made and that the secured creditor be afforded an opportunity to present evidence as to the present fair valuation of such farm and that the Conciliation Commissioner de-

termine the correct appraised value" . . . (Order of March 21, 1941; R. 7).

The conciliation commissioner conducted a hearing and in addition to the evidence submitted reported that he had made a "personal investigation" R. 8, next to last paragraph. The evidence at that hearing included the former $5,800 valuation by the same court of the same farm in the same proceeding (R. 27, top of page). He found the valuation to be $25,200. R. 8, next to last paragraph; (168 acres at $150, $25,200).

Upon a petition for review the judge of the district court erroneously found that the $5,800 valuation was "**made for taxation purposes,**" that is, that the $5,800 valuation was by the state for tax assessment and was foreign to any valuation in the farmer debtor proceeding under Section 75 (s) R. 29, end of first paragraph; R. 29 at p. 31. He modified somewhat the valuation of the conciliation commissioner, reducing it to $20,000.

On appeal the district court was sustained, without opinion.

This Court granted certiorari and found that the $5,800 valuation was an appraisal, approved by the conciliation commissioner, in the same farmer debtor proceeding, contrary to the finding of the district court that it was for "taxation purposes" (*Carter* v. *Kubler*, 1943, 320 U. S. 243, second paragraph of the opinion). This Court further found that the procedure by the conciliation commissioner was improper.

The First Order Involved Here.

When the case came back to the district court below the appellant tendered to the clerk of that court his "Petition for Rehearing" which the clerk refused to file. R. 40. The Judge of the district court in Chambers denied the petitioner's request to file it. (R. 49, last paragraph of first Journal Entry).

In that "Petition for Rehearing" the appellant stated that he desired to redeem his 168 acre farm under the statutory provision that he may redeem it at its "present fair and reasonable market value." R. 40 to 48.

He showed that the district court itself had found the farm was worth $5,800 but that contrary to the evidence (by making a "personal investigation") the conciliation commissioner had increased it to $25,000, which the judge reduced to $20,000 after throwing out of the case the former $5,800 valuation, (by the remark that the $5,800 "was for taxation purposes." R. 29 end of first paragraph).

He showed that the $20,000 valuation was "not in accordance with the evidence submitted," because the $5,800 valuation by the same court was entirely disregarded. And further, because the evidence on which the $25,000 and $20,000 valuations were based did not support either of them, and they were fantastic, having no relation to the evidence. He submitted new evidence by way of affidavits which showed by events occurring subsequent to the valuation hearing that both the figures of $25,000 and $20,000 were unsupportable (R. 40 to 48). The complete evidence on which the conciliation commissioner based his $25,000

valuation and the judge reduced it to $20,000 is at R. 9 to 28.

By his order, the first one appealed from, the judge of the district court denied the right to file the petition for rehearing. R. 49, first order.

The Second Order Involved Here.

By the second order appealed from the farmer debtor was given until January 29, 1944, to redeem at the $20,000 or the farm was to be sold at public sale. R. 49 to 50, second order.

An appeal followed, (R. 50), in which the district court was sustained without opinion as to both orders R. 57.

II.

Statement of the Statutory Basis of the Jurisdiction of This Court.

The jurisdiction of this court is conferred by Section 240 (a) of the Judicial Code; 28 U. S. C. 347 (a).

The petitioner has complied with Section 8 (a) of the Act of February 13, 1925; 28 U. S. C. 350. The final judgment of the court below (R. 57) became final on December 4, 1944, when a petition for rehearing was denied (R. 58). This petition is filed within three months thereafter.

III.

The Questions Submitted.

1.

Could the appellant be denied the right to file his petition for rehearing, which was presented to the clerk on December 20, 1943? R. 40 to 48.

2.

Could the lower court order the appellant farmer debtor to redeem his farm at a valuation of $20,000 under penalty of having it sold, which $20,000 sum was based upon an erroneous finding that a previous valuation of $5,800 pertained to a different proceeding and therefore was not pertinent, whereas this Court found that said $5,800 was the valuation previously fixed for the same farm, in the same farmer debtor proceeding by the same court? R. 40, first three paragraphs; *Carter* v. *Kubler*, 1943, 320 U. S. 243, second paragraph at page 244.

IV.

Reasons Relied Upon for Allowance of a Writ of Certiorari.

1.

The petitioner was denied due process of law when the Clerk refused, and the Court of appeals sustained the Clerk in refusing to file his petition for rehearing.

2.

The petitioner was denied due process of law when the judge of the district court denied, and the Court of appeals sustained the district court in denying, his request to file his petition for rehearing.

3.

The district court violated Section 9 of the Judicial Code: 28 U. S. C. 13, which provides that the district courts shall be deemed always open, as courts of equity, for the purpose of filing any pleading, and making motions, and the Court of appeals erred in sustaining such violation by the district Court.

4.

The district court violated Rule 77 (a) of the Rules of Civil Procedure for the District Courts of the United States, which provides that district courts shall be deemed aways open for the purpose of filing any pleading or other paper and the court of appeals erred in sustaining the district court in such violation.

5.

The Court of appeals sanctioned the departure by the district court from the accepted and usual course of judicial proceedings in denying to the petitioner his right to file his motion in the office of the Clerk of the district court.

6.

The decision of the court of appeals is contrary to the generally recognized course of conduct of judicial offices.

7.

The Court of appeals by "concluding that at some point there must be an end to litigation and a recognition of final adjudication" (R. 57), violated the fundamental right of a litigant to have his claim of right judicially determined. Said appellate court refused to consider in any way the claim of the petitioner.

8.

The finding of this Court in *Carter* v. *Kubler*, 320 U. S. 243, second paragraph at page 244, that $5,800 was the original valuation of the farm in same proceeding, which finding overruled the finding of the district court that it was for a different purpose ("taxation,") and the finding of the district judge that there had been but a little change in value since that original valuation, have been disregarded by both the district court and the court of appeals. The result is that the order requiring the petitioner to redeem his farm, or in lieu thereof to have his farm sold, is a direct violation of the statutory duty of the court to fix a value for redemption in accordance with the evidence submitted. Order R. 49, bottom of page. Section 75(s) (3).

9.

The order of the district court requiring the petitioner to redeem his farm is in violation of Section 75 (s) (3) requiring the court first to fix a value of redemption in accordance with the evidence submitted.

10.

In expressly adhering to its former holding in *Carter* v. *Kubler*, 131 Fed. (2d) 222, that the bankruptcy court had a "judicial discretion" to fix the sum at which a farmer

debtor shall redeem his farm under Section 75 (s) (3), the order of the appellate court below is in conflict with the decision of the Eighth Circuit Court of Appeals in *Peterson* v. *John Hancock*, 116 Fed. (2d) 148, in holding that "The statute, as construed by the Supreme Court in *Bartels* case is explicit and mandatory, and the District Court had no discretion to act contrary to its terms," and holding that "judicial decision and not judicial discretion" is what is called for.

11.

The decision of the appellate court in sustaining the order of the district court requiring redemption, or in lieu thereof, requiring sale of the petitioner's farm, without any valuation being fixed by the court in accordance with the evidence submitted, is in conflict with the decision of this court in *John Hancock* v. *Bartels*, 308 U. S. 180; *Gray* v. *Union Joint Stock Land Bank*, 308 U. S. 523; *Morrison* v. *Federal Land Bank*, 308 U. S. 524; *Borchard* v. *California*, 310 U. S. 311; *Wright* v. *Logan*, 315 U. S. 139; and *Wragg* v. *Federal Land Bank*, 317 U. S. 325, holding that Section 75 of the Bankruptcy Act provides an orderly procedure which this court called a "Mandate of the Statute." The provision of Section 75 (s) (3) that redemption shall be made at a valuation fixed in "accordance with the evidence submitted" has been utterly disregarded by the district court, which the appellate court has sustained.

12.

The decision of the appellate court in sustaining the district court in its order for redemption, or in lieu thereof, ordering a sale of the petitioner's farm without first fixing the valuation for redemption in accordance with Section

75 (s) (3), is in conflict with the decision of this court in *Wright* v. *Union Central*, 311 U. S. 273, that the statute must be "liberally construed to give the debtor the full measure of the relief afforded by Congress, lest its benefits be frittered away by narrow formalistic interpretations which disregard the spirit and the letter of the Act." The decision and order below disregard the express provision of Section 75 (s) (3) that the valuation for redemption must be fixed "in accordance with the evidence submitted."

Wherefore your petitioner prays that a writ of certiorari issue to the Sixth Circuit Court of Appeals directing it to certify and send to this court a transcript of the record and proceedings thereon to the end that this cause may be determined by this court and for all other relief as may be proper.

Respectfully submitted,

ELMER MCCLAIN, Lima, Ohio,
Counsel for Petitioner.

Lima, Ohio.
February 24, 1945.

BRIEF.

In Support of the Foregoing Petition for a Writ of Certiorari.

The index precedes the petition for certiorari.

I.

The Final Orders Below.

The appellate court handed down no opinion. Its final order appears at R. 57. No opinion was rendered by the Judge of the District Court. The two orders of the District Court, which were sustained by the Appellate Court, appear at R. 49.

II.

Grounds on Which the Jurisdiction of This Court is Invoked

The statutory basis of the jurisdiction of this court has been stated at page 5 of the preceding petition for certiorari, and the grounds relied upon for invoking the jurisdiction of this court have been set forth at pages 6 to 10 of the preceding petition. To recapitulate them, they are: that the fundamental right of a litigant to file a plead-

ing or motion has been denied; that an important question of the interpretation and administration of a federal statute is involved, namely Section 75 (s) (3) which prescribes the procedure whereby a farmer debtor may redeem his farm from liens against it; that the decision of the appellate court below is in direct conflict with said statute; and it is in conflict with the following decisions:

Peterson v. *John Hancock*, 1940, 116 Fed. (2d) 148;
John Hancock v. *Bartels*, 308 U. S. 180;
Gray v. *Union Joint Stock Land Bank*, 308 U. S. 523;
Morrison v. *Federal Land Bank*, 308 U. S. 524;
Borchard v. *California*, 310 U. S. 311;
Wright v. *Logan*, 315 U. S. 139;
Wragg v. *Federal Land Bank*, 317 U. S. 325;
Wright v. *Union Central*, 311 U. S. 273.

III.

STATEMENT OF THE CASE.

The District Court Order to Conciliation Commissioner to Conduct Valuation Hearing.

Following the decision of this court in the second case of *Wright* v. *Union Central*, 1940, 311 U. S. 273, holding that a farmer debtor's farm may not be sold under Section 75 (s) (3) until he has had an opportunity to redeem it at its appraised value, the bankruptcy court issued its order of March 21, 1941, directing the conciliation commissioner to have a hearing at which "the secured creditor be afforded an opportunity to present evidence as to the present fair value of such farm and that the conciliation commissioner

determine the correct appraised value and fix a reasonable time within which the debtor shall redeem the farm from the mortgage lien." R. 8 to 9.

Hearing Before the Conciliation Commissioner.

A hearing was held by the conciliation commissioner at which evidence was submitted by the secured creditor and by the farmer debtor. A narrative form of the evidence appears at R. 10 to 28.

Conciliation Commissioner's Report After Hearing.

The conciliation commissioner reported that he conducted a hearing and "after hearing the testimony given by the several witnesses, and studying the briefs furnished by the defendant and the plaintiff, and upon a personal investigation by the conciliation commissioner of the value of said farm I hereby fix the value of said farm at $150 per acre." ($25,200). R. 9.

The value so set by the conciliation commissioner was reduced to $20,000 by the district judge who expressly disregarded the former valuation of $5,800 in the same proceeding stating that such value "was made for taxation purposes." This disregard of the $5,800 valuation was in conflict with the evidence which the record clearly showed to be prior valuation of the farm in question by the same conciliation commissioner in the same proceeding. In his opinion the district judge expressly found there had been little change in the value of the farm, his words being, "although it has improved somewhat within the last two or three years." Stating there were no "present or prospective developments" to justify a fair market value outside of its bare agricultural value. R. 35 to 37.

The court of appeals on appeal held that the district court had a "discretion" to set the valuation and affirmed it.

This Court expressly held on certiorari in *Carter* v. *Kubler*, 320 U. S. 243, that the $5,800 valuation was an appraisal of the same farm in the same proceeding by the same conciliation commissioner, such holding being directly contradictory to the finding of the district court that the $5,800 was for "taxation purposes." *Carter* v. *Kubler*, 320 U. S. 243, second paragraph. This Court also held that the conciliation commissioner's "personal investigation was improper. When the case came back to the district court the petitioner sought to have the value of his farm fixed for his redemption by having the district court consider the $5,800 valuation which the judge had refused to consider on the ground that it was merely for "taxation purposes" and not concerned with the farmer debtor proceeding.

He prepared his petition for rehearing and presented it to the Clerk who refused to file it, and his request to the Court that it be filed was denied. This is the first order appealed from. R. 49 First Order.

The district court then ordered the farmer debtor to redeem at the former erroneously based $20,000 valuation or have his farm sold. This is the Second Order appealed from. R. 49, Second Order.

On appeal both orders were sustained without opinion. R. 57. The first order denying the right to file the petition

for rehearing was ignored. The second order was sustained on the stated ground that "there must be an end to litigation and a recognition of final judgment." R. 57. Thus ignoring the court's refusal to permit the petitioner to file his motion, and ignoring the refusal of the district court to consider the "evidence submitted," of the $5,800 official valuation by the court itself.

IV.

SPECIFICATION OF ERRORS.

1.

The petitioner was denied due process of law when the Clerk refused and the court of appeals sustained the Clerk in refusing to file his petition for rehearing.

2.

The petitioner was denied due process of law when the judge of the district court denied and the court of appeals sustained the district court in denying, his request to file his petition for rehearing.

3.

The district court violated Section 9 of the Judicial Code 28 U. S. C. 13, which provides that the district court shall be deemed always open, as courts of equity, for the purpose of filing our pleading, and making motions, and the court of appeals erred in sustaining such violation by the district court.

4.

The district court violated Rule 77 (a) of the Rules of Civil Procedure for the District Courts of the United States which provides that district courts shall be deemed always open for the purpose of filing any pleading or other paper, and the court of appeals erred in sustaining the district court in such violation.

5.

The court of appeals erred in sanctioning the departure by the district court from the accepted and usual course of judicial proceedings in denying to the petitioner his right to file his motion in the office of the clerk of the district court.

6.

The decision of the court of appeals is contrary to the generally recognized course of conduct of judicial offices.

7.

The court of appeals by "concluding that at some point there must be an end to litigation and a recognition of final adjudication" (R. 57), violated the fundamental right of a litigant to have his claim of right judicially determined. Said appellate court refused to consider in any way the claim of the petitioner.

8.

The appellate court and the district court erred in disregarding the holding of this court that $5,800 was the original valuation of the farm which overruled the finding of the district court that such valuation had no relation to the case thus disregarding the evidence submitted. The result is that the order requiring the petitioner to redeem

his farm, or in lieu thereof to have his farm sold, is a direct violation of the statutory duty of the court to fix a value for redemption in accordance with the evidence submitted. Order R. 49, bottom of page. Section 75 (s) (3).

9.

The order of the district court requiring the petitioner to redeem his farm is in violation of Section 75 (s) (3) requiring the court first to fix a value of redemption in accordance with the evidence submitted.

10.

The appellate court erred in expressly adhering to its former holding in *Carter* v. *Kubler*, 131 Fed. 222, that the bankruptcy court had a "judicial discretion" to fix the sum at which a farmer debtor shall redeem his farm under Section 75 (s) (3), and such holding of the appellate court below is in conflict with the decision of the Eighth Circuit Court of Appeals in *Peterson* v *John Hancock*, 1940, 116 Fed. (2d) 148, in holding that "The Statute, as construed by the Supreme Court in *Bartels* case, is explicit and mandatory, and the District Court had no discretion to act contrary to its terms," and holding that "judicial decision and not judicial discretion" is what is called for.

11.

The decision of the appellate court in sustaining the order of the district court requiring redemption, or in lieu thereof, requiring sale of the petitioner's farm, without any valuation being fixed by the court in accordance with the evidence submitted, is in conflict with the decision of this court in *John Hancock* v. *Bartels*, 308 U. S. 180; *Gray* v. *Union Joint Stock Land Bank*, 308 U. S. 523; *Morrison* v. *Federal Land Bank*, 308 U. S. 524; *Borchard* v. *California*,

310 U. S. 311; *Wright* v. *Logan*, 315 U. S. 139; and *Wragg* v. *Federal Land Bank*, 317 U. S. 325, holding that Section 75 of the Bankruptcy Act provides an orderly procedure which this court called a "Mandate of the Statute." The provision of Section 75 (s) (3) that redemption shall be made at a valuation fixed in "accordance with the evidence submitted" has been utterly disregarded by the district court, which the appellate court has sustained.

12.

The decision of the appellate court in sustaining the district court in its order for redemption, or in lieu thereof, ordering a sale of the petitioner's farm without first fixing the valuation for redemption in accordance with Section 75 (s) (3) is in conflict with the decision of this court in *Wright* v. *Union Central*, 311 U. S. 273, that the statute must be "liberally construed to give the debtor the full measure of the relief afforded by Congress, lest its benefits be frittered away by narrow formalistic interpretations which disregard the spirit and the letter of the Act." The decision and order below disregard the express provision of Section 75 (s) (3) that the valuation for redemption must be fixed "in accordance with the evidence submitted."

V.

SUMMARY OF THE ARGUMENT.

1.

The refusal of the clerk to file the "Petition for Rehearing" was an unlawful and arbitrary denial of a fundamental right—it deprived him of due process of law.

2.

The only lawful valuation for redemption of the appellant's farm was $5,800. There has never been any other valuation in accordance with the statutory prescription that it must be "**IN ACCORDANCE WITH THE EVIDENCE SUBMITTED.**"

3.

The proceedings in the district court below cut right across the course of the uniform course of the decisions of this court, that in administering Section 75 the orderly procedure of the statute is a mandate to be followed.

1.

The refusal of the clerk to file the "Petition for Rehearing" was an unlawful and arbitary denial of a fundamental right—it deprived him of due process of law.

The refusal to file, and denial of the right to file, his "Petition for Rehearing" was an arbitrary denial of the

most sacred legal right of every person who is a party to a judicial proceeding.

It is a denial of justice to say that,

> "at some point there must be an end to litigation and a recognition of final adjudication." (R. 59).

short of full and complete consideration of all of the issues presented.

Emphatically, if jurisprudence is to serve justice, there must be no end to litigation by a court, which itself has failed to consider the "evidence submitted," and there can be no "final adjudication" while there is outstanding an utter disregard of "evidence submitted" and of the plain mandatory requirement of the statute that:

> "the court **shall** . . . fix the value of the property **in accordance with the evidence submitted and the debtor shall then pay the value so arrived at into court.**" Section 75 (s) (3).

A court of justice cannot refuse to a litigant the right to file a pleading or motion in his case.

A bankruptcy court as a court of equity is always open, 28 U. S. C., Section 13.

The district courts shall be deemed always open for the purpose of filing any pleading or other proper paper. Rules of Civil Procedure, Rule 77 (a).

A court is not "open" if a document presented for filing will not be received.

The clerk "is required to" . . . "file pleadings." . . . "That such services are connected with a clerk's office is beyond question. They constitute his principal and most important duties." *U. S.* v. *Oliphant*, 230 Fed. 1. "It is the of-

ficial duty of the clerk of a court to file all the papers in a cause presented by the parties" . . . 11 Corpus Juris "Clerk of Courts," Section 73. "Mandamus will lie to compel the clerk" . . . "to file papers properly delivered to him." . . . 38 Corpus Juris, "Mandamus," Section 109.

The deprival of a litigant's right to his day in court is the "unpardonable sin" of Anglo-Saxon jurisprudence. It violates the guarantee wrested from the king at Runnymede seven centuries ago that justice shall be free and not dispensed as a favor nor sold. It ignores the due process twice secured to all persons, first in the Bill of Rights by the Fifth Amendment and again in the Fourteenth Amendment.

Is the clerk to be permitted to extinguish an issue by refusing to file a paper presented by a litigant?

May the judge of a court prejudge a paper presented for filing by a litigant and refuse his right to file it in the court?

The implications involved in following such suggestions to their logical conclusions and ramifications are too ghastly to be contemplated by the light of the long history of American Jurisprudence and its sources running back through many centuries of struggle for a government of laws and not of men.

However honest and righteous a court officer or minister may be in a specific case, the refusal of the elementary right of a litigant to file his motion, lays the ground by precedent for the breakdown of the foundation of justice in the courts.

2.

The only lawful valuation for redemption of the appellant's farm was $5,800. There has never been any other valuation in accordance with the statutory prescription that it must be "IN ACCORDANCE WITH THE EVIDENCE SUBMITTED."

This next subject is an equally serious deprivation of the appellant's rights. It blows off the cylinder head of the statute and leaves it impotent to accomplish the sole purpose of Section 75—the right to redeem his farm at its value fixed "in accordance with the evidence submitted." It is judicial process itself that is on trial.

The district court has no **POWER** to fix the value of a farmer debtor's farm for redemption except as laid down in Section 75 (s) (3). It is there required that the court **shall** "fix the value of the property in accordance with the evidence submitted, and the debtor shall then pay the value so arrived at into court" . . . "and thereupon the court **shall,** by an order, turn over full possession and title of said property, free and clear of all encumbrances to the debtor."

The "evidence submitted" included the $5,800 valuation of the same farm by the same court in the same proceeding. But the court arbitrarily threw out that part of the evidence and refused to consider it saying it was "made for taxation purposes" (Memorandum of the court, R. 39, end of first paragraph). Even in a case where the conciliation commissioner refused to consider the assessed valuation for taxation by the state in fixing the valuation for redemption in a farmer debtor proceeding, the judge held that the conciliation commissioner does not have the right to refuse to consider it, and vacated the conciliation commissioner's

findings and order. *In re Breuer,* Farmer Debtor, District Court, North Dakota, 1943, 52 Fed. Supp. 982.

Because confusing and specious arguments have dogged this case and chased out any consideration of the real issue they should be driven away. Therefore it must be said that it is not "a reconsideration of the evidence," or a mere "rehearing of the evidence" that is involved. What is sought is a consideration of evidence that was entirely disregarded—thrown out of all consideration. This Court in *Carter* v. *Kubler*, 320 U. S. 243, held the district judge was in error in finding that the $5,800 valuation was for "taxation purposes" and alien to the case. This court held that the $5,800 valuation was the previous valuation of the farm, and by statute it was the valuation for redemption if no other valuation had been ordered. See the first sentence of Section 75 (s) (3). The judge of the District Court has never weighed this material evidence. Until it is weighed there is no valuation in "accordance with the evidence submitted."

Putting it another way, this cause is not presented on the theory that the evidence weighed by the District Court does not support the conclusion reached by that court. (Although when examined, it is perfectly clear that it does not; R. 9 to 28). It is presented on the basis that the district court utterly disregarded evidence essential to a legal conclusion to be reached "in accordance with the evidence submitted."

It may be thought that the district judge's $20,000 conclusion would have been the same if he had considered and weighed the $5,800 valuation because of a rise in values in the interval since it was originally fixed. It could not have been the same because there was little change in value. Let use examine his own words on that subject:

He said:

> "**The buildings and fences are probably of little value for appraisal purposes and the timber land probably the same.**" "A review of the testimony gives the impression that **there is not an active market for farm land in this location** at least, although it has improved somewhat within the last two or three years. While it may be possible that the land has a potential value for development into the country place class, if and when conditions favorable for such development return, yet **it is to be seriously doubted that such a market value ever will exist and it must be regarded as merely speculative**, as matters stand. **There are no present or prospective developments to justify a fair market value upon such basis.** Generally, the rule is that the fair market value is the price which a willing seller could reasonably expect to obtain from a desirous buyer, neither being under necessity" (Memorandum opinion, R. 30 and 31).

The original valuation set by the court itself and accepted without objection or exception by all parties was utterly disregarded. Had the judge of the district court considered that valuation, it could never have fixed the present value at $20,000, which is nearly three and a half times its former value, because he himself said "there is not an active market for farm land in this location." And as to the site value he said "it is to be seriously doubted

that such a market value will ever exist and it must be regarded as merely speculative, as matters stand." Memorandum opinion, R. 30 to 31.

By the terms of Section 75 (s) (3) the court shall:

"After such hearing, fix the value of the property, **in accordance with the evidence submitted.**" The value by the same Section 75 (s) (3) is the "then fair and reasonable market value."

In exercising its statutory function of fixing the valuation for redemption in "accordance with the evidence submitted" the court sits as a jury, and is bound by the laws of evidence as is any jury. Let this instance be examined accordingly as if the evidence here submitted had been submitted to a jury, together with interrogatories to be returned with the verdict. If the general verdict is inconsistent with the special findings returned by the answer to the interrogatories, the verdict must be set aside and resubmitted to another jury.

Let it be supposed that a court charges the jury that it is to fix the "then fair and reasonable market value in accordance with the evidence submitted."

Verdict: "$20,000." (Opinion, R. 29, last paragraph of opinion at R. 31).

Question 1: "Has there been any substantial increase in value in the last two or three years?"

Answer: "There is not an active market for farm land

in this location, although it has improved somewhat in the last two or three years." Note: The dictionary defines somewhat as meaning little. (Opinion, R. 29, middle of paragraph at bottom of page 30).

Question 2: "Has the farm any site value?"

Answer: "It is to be seriously doubted that such a value will exist and it must be regarded as merely speculative." (Opinion, R. 29, bottom of page 30, top of page 31.)

Question 3: "In fixing the value did you consider the former $5,800 valuation?"

Answer: "No. It was made for taxation purposes." (Opinion, R. 29, end of first paragraph).

Can it be doubted that a motion for a new trial must be granted? Can it be doubted that if a new trial were denied the order denying it would be reversed? A new trial would have to be granted because the undisputed evidence is that $5,800 was the valuation when conditions were substantially the same.

The error is plain and a court of equity is obliged by its very nature and by the purpose of the statute it admin-

isters to consider the discarded evidence and fix a value in accordance with the evidence submitted.

"It is judicial process itself that is on trial," because the same court in the same proceeding fixed the value of the same farm at $5,800 and the same court itself found there has been no substantial increase in value since the $5,800 valuation was fixed and that there was no site value. But the court forgot its former action and thought the $5,800 concerned a different subject and was not its own act and disregarded it altogether. Due process of law does not so comport itself.

3.

The proceeding in the district court below cut right across the course of the uniform course of the decisions of the court, that in administering Section 75 the orderly procedure of the statute is a mandate to be followed.

No rule has ever been more clearly established by this Court, nor more firmly and consistently adhered to, than that

> The letter and spirit of Section 75, the farmer debtor law, must be honestly adhered to in order to carry out its purpose to permit the farmer debtor to redeem his property at a valuation set by the court in accordance with the evidence. The orderly procedure named in the statute is a mandate to be followed. No specious or narrow formalistic interpretation in disregard of the spirit and letter of the law will be permitted.

Every deviation from these principles so far adjudicated by the court was held to be unlawful and was corrected.

These principles have been enunciated and repeated over and over again in the following cases:

Wright v. *Vinton*, 300 U. S. 440;
First National Bank v. *Beach*, 301 U. S. 435;
Adair v. *Bank*, 303 U. S. 350;
Wright v. *Union Central*, 304 U. S. 502;
John Hancock v. *Bartels*, 308 U. S. 180;
Gray v. *Union*, 308 U. S. 523;
Morrison v. *Federal*, 308 U. S. 524;
Kalb v. *Feuerstein*, 308 U. S. 433;
Borchard v. *California*, 310 U. S. 311;
Wright v. *Union Central*, 311 U. S. 273;
Wright v. *Logan*, 315 U. S. 139;
Mangus v. *Miller*, 317 U. S. 178;
Wragg v. *Federal*, 317 U. S. 325.

The devices employed to defeat the spirit and purpose of Section 75 have been applied to every substantial provision of the act from the right to file a petition to the right to redeem the property at its fair and reasonable value. The right to redeem is equally as important as the right to file a petition to involve the operation of the statute. For the invocation of the statute is not merely to see the wheels go round, but for the very practical purpose of redeeming the farmer debtor's farm at its real value. A court equally deviates from the orderly mandate of the statute whether it denies the right to file, or dismisses a petition already filed, or disclaims farm and authorizes foreclosure, or merely disregards the provisions of Section 75 (s) (3) that

> "The court shall . . . fix the value of the property in accordance with the evidence submitted, and the debtor shall then pay the value so arrived at into court . . . and thereupon the court shall, by an order, turn over full possession and title of said property, free and clear of all encumbrances to the debtor."

Conclusion.

The refusal of the right to file a motion in the proceeding was an arbitrary denial of a fundamental right and should be corrected.

The chief end purpose of the farmer debtor law, namely, to give the farmer-debtor a genuine opportunity to redeem his farm at its real value, has been thwarted by a disregard of the provision of the statute that all the evidence, not merely a part of it, must be considered in fixing that value for redemption.

The principles announced in the adjudication of the statutes involved here, which have been declared and often repeated in many opinions of this Court are violated by the procedure followed in this case.

Wherefore your petitioner prays that a writ of certiorari may issue.

Respectfully submitted,

ELMER MCCLAIN, Lima, Ohio,
Counsel for the Petitioner.

Lima, Ohio.
February 24, 1945.

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FILED
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CHARLES ELMORE CROPLEY
CLERK

No. 1011

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1944

THAD BENSON CARTER,
Petitioner,

vs.

GEORGE A. KUBLER,
Respondent.

BRIEF OF RESPONDENT, GEORGE A. KUBLER, Opposing Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

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I. THE PETITION FOR REHEARING

The Petition for Rehearing is shown at R. 40-48, inclusive. Such pleading does not present any question which was not judicially determined by the Supreme Court of the United States and reported in 320 U. S. 243. Mr. Justice Murphey delivered the opinion of the court.

The application for rehearing was denied. R. 320 U. S. 814.

II. DECISION OF THE UNITED STATES DISTRICT COURT

After the Mandate from the Supreme Court to the United States District Court, and on December 22, 1943, counsel for Thad Benson Carter presented his Petition for Rehearing, and Judge Jones of the District Court held as follows:

> "This day there being present in chambers W. T. Kimber representing the secured creditor and Elmer McClain representing the Debtor, thereupon the Debtor, by its attorney, presented for filing in Court his Petition for Rehearing in this matter, marked received December 20th, 1943.
>
> The Court having heard the statements of the attorneys and having before it the Mandate of the Supreme Court of the United States in this matter affirming the former judgment of this Court, finds that further pleadings of the nature herein presented by the Debtor are not proper or in order.
>
> The Court therefore denies the Debtor his request to file the Petition for Rehearing."
>
> R. 49.

On the same day, December 22, 1943, by Journal Entry Judge Jones held as follows:

> "On mandate to this court in this cause from the Supreme Court of the United States and on application of the secured creditor, George A. Kubler, pursuant to notice to the farm debtor, Thad Benson Carter, and to his counsel, Elmer

McClain, the court fixes the date of January 29, 1944, within which the said farm debtor may redeem the farm at the appraised value of $20,000.00 and in lieu of said Carter failing to redeem the farm within said time then that a public sale of the farm is ordered according to law." R. 49-50.

III. APPEAL TO THE UNITED STATES CIRCUIT COURT, SIXTH CIRCUIT

On appeal to the United States Circuit Court of Appeals, Sixth Circuit, that court, on November 6, 1944, entered its judgment on such appeal as follows:

"The court being unable to perceive that fundamentally any issue raised by the appeal other than or essentially different from that decided by us in *Carter v. Kubler,* 131 Fed. (2d) 222, with decision affirmed in ***Carter v. Kubler,*** 320 U. S., 238 (correct page 243) and concluding that at some point there must be an end to litigation and a recognition of final adjudication, it is the judgment of the court that the orders and decree below should be and they are in all respects AFFIRMED." R. 57.

The application for rehearing in the Circuit Court of Appeals was denied December 4, 1944. R. 58.

IV. STAY OF MANDATE BY THE U. S. CIRCUIT COURT OF APPEALS

What is not shown in the Transcript of Record is the order of the United States Circuit Court of Appeals made and entered in response to application by Thad

Benson Carter, as Appellant, for a stay of issuance of the Mandate for 60 days, pending his application to the Supreme Court of the United States for certiorari. The court, on December 12, 1944, through J. W. Menzies, Clerk, delivered the following:

> "The court today entered an order staying mandate in the above cause, pending application to the Supreme Court for certiorari, and providing that if such application is made within thirty days from this date then the mandate is further stayed until final disposition of the case in the Supreme Court."

Thereafter, and on January 10, 1945, counsel for Thad Benson Carter, by motion, asked for a further stay of the issuance of the Mandate, and on hearing, the court, on January 29, 1945, ordered the following, as certified to counsel by J. W. Menzies, Clerk:

> "The motion for a further stay of the issuance of a mandate in this cause filed January 10, 1945, is denied."

V. JUDGMENT OF THE U. S. DISTRICT COURT ON RECEIPT OF MANDATE FROM U. S. CIRCUIT COURT OF APPEALS, AND WHICH LIKEWISE IS NOT SHOWN IN TRANSCRIPT OF RECORD

> "In conformity with Rule 77(d) of the Federal Rules of Civil Procedure please take notice that the following order or judgment was entered on Feb. 3, 1945. C. B. Watkins, Clerk, U. S. District Court, Northern District of Ohio.

In the District Court of the United States
For the Northern District of Ohio
Eastern Division

In the matter of	)	
Thad Benson Carter	)	No. 33696 Bankruptcy
Farmer Debtor	)	

Entered by Jones, J.:

This cause having been removed from this court to the United States Circuit Court of Appeals for the Sixth Circuit by the appeal of the Farmer Debtor from the order entered in this cause on the 22nd day of December, 1943, and the said Circuit Court of Appeals having ordered and adjudged that the said judgment of this court in this cause be affirmed and the said Circuit Court of Appeals having remanded said cause to this court as appears by the mandate of the Circuit Court of Appeals now here,

It is ordered that the judgment of said Circuit Court of Appeals be entered as the judgment of this court and that George A. Kubler recover of said Farmer Debtor costs herein expended, taxed at $....., and have execution therefor."

It is submitted that the Petitioner's application for a writ of certiorari on the 3rd day of March, A. D. 1945, was not taken in compliance with the order of the United States Circuit Court of Appeals.

VI. REHEARING ON ISSUE JUDICIALLY DETERMINED

A reference to the claims asserted in the Petition for Rehearing, when stripped of its evidentiary matter, shows that the pleader attempts to raise the same general

questions which were urged and judicially determined in the United States District Court, the United States Circuit Court of Appeals, and in the Supreme Court of the United States, all pertaining to the question of the revaluation of the farm lands in question.

VII. AUTHORITIES

We respectfully refer to the concluding paragraph of the opinion of the Supreme Court by Mr. Justice Murphey in 320 U. S. 243.

May we also cite *30 American Jurisprudence*, Par. 165 at Page 911.

> "The doctrine of res judicata rests upon the ground that the party to be affected, or some other with whom he is in privity, has litigated, or had an opportunity to litigate, the same matter in a former action in a court of competent jurisdiction, and should not be permitted to litigate it again to the harassment and vexation of his opponent. The doctrine of res judicata not only puts an end to strife, but produces certainty as to individual rights and gives dignity and respect to judicial proceedings. It is considered that a judgment presents evidence of the facts of so high a nature that nothing which could be proved by evidence aliunde would be sufficient to overcome it; and therefore it would be useless for a party against whom it can be properly applied to adduce any such evidence, and accordingly he is estopped and precluded by law from doing so."

VIII. QUESTION OF DELAY

The real motive of the Petitioner, Thad Benson Carter, in seeking to continue the litigation by his numerous appeals from the judgments of the various courts in this controversy, and for some four years in time, does not fully appear from the record.

Throughout all such litigation, Carter has continued to reside on the farm, receiving the income therefrom, and without payment of any rental amount, and without even payment of taxes, passing all such burdens on to the Respondent, George A. Kubler, as the mortgage creditor.

We submit, therefore, that the Petitioner should not be privileged longer to continue this cause and to thus challenge and, indeed, defy the orders and judgment of the Supreme Court of the United States, the Circuit Court of Appeals, and the United States District Court.

IX. CONCLUSION

We, therefore, submit that the writ of certiorari should not issue.

Respectfully submitted,

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Attorney for Respondent,
George A. Kubler.

March 28, 1945.